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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

The Petition of the State of Minnesota	)	
Acting By and Through the Minnesota	)	
Department of Transportation and the	)	
Minnesota Department of Administration,	)	
for a Declaratory Ruling Regarding	)	CC Docket No. 98-1
the Effect of Sections 253(a), (b) and (c)	)	
of the Telecommunications Act of 1996	)	
on an Agreement to Install Fiber Optic	)	
Wholesale Transport Capacity in	)	
State Freeway Rights-of-Way	)	

COMMENTS OF
KMC TELECOM INC. AND KMC TELECOM II, INC.

I. Introduction.

KMC Telecom Inc. and KMC Telecom II, Inc. (collectively, "KMC") respectfully submit these comments on the request for Declaratory Ruling filed by the State of Minnesota (the "State"), pursuant to Public Notice DA 98-32, released January 9, 1998.

The State has petitioned the Federal Communications Commission (the "Commission") for an expedited ruling that the State's proposal to grant a wholesale provider of fiber optic transport capacity exclusive access to valuable State freeway rights-of-way (the "Agreement") is consistent with Section 253 of Telecommunications Act of 1996 (the "Act"). KMC is a facilities-based competitive local exchange carrier currently constructing a fiber optic network in Minnesota and, as such, will be directly and detrimentally impacted if the State receives the

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Declaratory Ruling that it seeks. The State's decision to restrict access to the State's freeway rights-of-way to just one provider for at least ten (10) years and for potentially as long as fifty (50) years constitutes an obvious state-erected barrier to market entry explicitly prohibited by Section 253. For the reasons set forth fully below, KMC urges the Commission to rule that the Agreement would violate Section 253 and, therefore, should be preempted by the Commission.

II. The Ruling That Minnesota Seeks Will Have Broad, Negative Competitive Impact.

The State seeks an expedited ruling on its petition (the "Petition"), noting that "the issue presented by this petition is critical to all large holders of freeway rights-of-way throughout the nation." Petition at 5. Indeed, should the Commission fail to preempt the State's Agreement to limit access to the State freeway rights-of-way to a sole provider, other states will undoubtedly be emboldened to implement similarly exclusive agreements.[1] Minnesota's discriminatory and anti-competitive Agreement therefore has the potential to negatively impact competition among telecommunication services providers throughout the country. It is precisely because of this broad negative impact that the Commission must carefully scrutinize--and ultimately reject--the State's position.

The State also urges the Commission to make an expedited ruling on the grounds that "[t]he need for [state] agencies to pursue telecommunications projects in freeway rights-of-way is presented by the rapid changes and increased use of fiber in transportation systems." Petition at 5 (emphasis added). Again, the State has highlighted an important reason that its Agreement cannot be allowed to stand. As the Commission well knows, the use of fiber optics by the

[1] The State submits that Illinois, Oregon, Utah, Colorado and Michigan are currently poised to act in a similar fashion. Petition at 5.

competitive telecommunications industry is developing at an explosive pace. Data is being transmitted by fiber today in quantities and at speeds inconceivable only a few years ago. The State's request for approval of an agreement that would lock in a sole provider with exclusive rights-of-way access for at least ten (10) and as many as fifty (50) years is intolerable to a competitive industry in which the state of technology currently being deployed makes the technology of (10) years ago look antique. In order to ensure the continued growth of robust competition, as is the Act's goal, the Commission must preserve the flexibility of competitive providers to take advantage of every opportunity for deployment of new technologies, including use of State freeway rights-of-way.

III. Telecommunications Infrastructure is Integral to Telecommunications Service.

The State advances as its primary argument in favor of the Agreement that the Agreement addresses "the creation of infrastructure and not the provision of telecommunications service" and, therefore, is not subject to the strictures of the Act.[2] Petition at 4; see also Petition at 13-17. In furtherance of its argument, the State asserts that "[w]holesale transport capacity is not a telecommunications service typically regulated by the Commission." Petition at 14. Regulation of wholesale transport capacity is not, however, at issue here. At issue is access to extremely valuable State freeway rights-of-way, which the State concedes must be granted on a non-discriminatory and competitively neutral basis.[3] Under the Agreement, however , such access

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[2] In relying upon this line of reasoning as its primary defense of the Agreement, the State tacitly acknowledges its difficulty in demonstrating that the Agreement conforms with the pro-competitive requirements of Section 253.

[3] "[I]f the State elects, in the management of its public rights-of-way, to permit the use of such rights-of-way for telecommunications purposes, then Section 253(c) requires that (a)

would be limited to a single wholesale provider ("the Developer") and those few competitors in a position to negotiate immediately with the Developer for collocation of their fiber, in the manner and configuration dictated by the Developer and the State.

The State's attempt to differentiate "infrastructure" from "services" ignores the very nature of competitive, fiber optics based, telecommunications services. In Section 253 of the Act, Congress recognized and specifically addressed competitive telecommunications providers' need to access the public rights-of-way for purposes of installing proprietary facilities. Congress articulated that in order to compete, new entrants to the telecommunications market must be given the opportunity, on a non-discriminatory and competitively neutral basis, to build their own fiber optic networks, control of which allows such providers to deliver services to customers at the lowest possible cost. Obviously, a facilities-based provider cannot be a facilities-based provider without infrastructure. Infrastructure, therefore, is the critical resource that a facilities-based telecommunications provider must possess in order to provide competitive telecommunications services. The Agreement would deny new entrants who either cannot or choose not to enter into an agreement with the Developer the right to develop and create infrastructure and to place fiber in freeway rights-of-way according to their own respective individual business and market development plans. In this way, the State would erect precisely the kind of barrier to entry that Section 253 prohibits.

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the compensation for such use be neutral and non-discriminatory, and (b) such use not discriminate between telecommunications providers." Petition at 30.

IV. Access to Capacity Does Not Substitute For Access to Rights-of-Way.

The State contends that requiring the Developer to lease capacity on its network on a non-discriminatory basis and to provide competitors with a one-time opportunity to collocate facilities is a sufficient substitute for physical access to the public rights-of-way in compliance with Section 253 of the Act. The Act, however, provides for no such substitution. Had Congress believed that non-discriminatory access to wholesale transport capacity was sufficient to ensure competition, as the State now asserts, the provisions in Section 253(c) addressing access to public rights-of-way would have been unnecessary and superfluous. But, as Congress clearly recognized, a competitor's ability to buy transport capacity from a wholesaler (whether or not the wholesaler is a retail competitor) is not the same as that competitor having proprietary development of and control over its own facilities. The State's contention that "[t]he relevant market affected by the Agreement is the wholesale fiber transport market" is simply erroneous. Petition at 20. The ability of a new entrant to purchase wholesale transport capacity on a non-discriminatory basis creates parity only among wholesale purchasers, and does nothing to level the playing field as between new market entrants--who, under the Agreement, will be unable to access freeway rights-of-way for up to fifty (50) years--and existing market players who have proprietary facilities already in place.

V. Access to Alternative Rights-of-Way is not a Substitute for Freeway Access.

The State also contends that despite the Agreement's effect of excluding new entrants from access to freeway rights-of-way, "new entrants have access to sufficient alternative rights-of-way." Petition at 20. The State cites, as examples, public rights-of-way associated with non-freeway State Trunk Highways, municipal rights-of-way, and private rights-of-way along

railroads, gas pipelines, oil pipelines and electric power lines. These rights-of-way, however, are in no way equivalent to the freeway rights-of-way from which new entrants would be excluded by the Agreement. Freeway rights-of-way, by definition, span the state, connecting population centers along the most direct and efficient routes. To attain similar coverage for its network by use of alternate routes, a telecommunications provider would likely be required to negotiate access agreements with multiple public and private entities (which may or may not be legally required to grant access) and/or to adopt less efficient and therefore more costly routing. In either event, a new entrant denied access to freeway rights-of-way will be at a competitive disadvantage as compared with existing market players who possess proprietary infrastructure already in place or who are able to collocate pursuant to the one-time opportunity afforded by the Agreement.

Even if the alternative rights-of-way, however, were equivalent to the freeway rights-of-way, the State's arguments still fail. Section 253 mandates non-discriminatory and competitively neutral access to all rights-of-way, not just to certain alternative rights-of-way, because Congress recognized that only by opening up all public rights-of-way to competitive facilities could vigorous competition be ensured.

VI. Minnesota Fails to Justify the Agreement on Public Safety Grounds.

The State attempts to justify the blatantly discriminatory impact of the Agreement by asserting that "protection of public safety requires exclusive longitudinal access with a single point of control and contact."[4] Petition at 27. Based upon this unilateral determination, the State

[4] It should be noted that the exclusive access to the freeway rights-of-way afforded by the Agreement extends, under the terms of the Agreement, for a period of at least ten (10)

contends that the Agreement is therefore protected by Section 253(b) of the Act, which reserves to States the right to impose competitively neutral requirements as necessary to ensure the public safety. The State concedes that "[i]n examining whether a state requirement is saved by Section 253(b), the Commission has sought to determine: (1) whether the requirement was necessary to fulfill the enumerated public interest objectives of Section 253(b); and (2) whether the requirement is competitively neutral." Petition at 27 (emphasis added). However, the State fails to provide credible evidence that the Agreement meets either part of this two-pronged test.

Neither the State's Petition nor any of its Exhibits demonstrate why exclusive access vested in a single provider for up to fifty (50) years is necessary to ensure that the public safety will not be jeopardized. Indeed, Minnesota has apparently found no such necessity in granting access to State Trunk Highways, which obviously share attributes with State freeways. See Petition at 23-24. There are any number of regulatory and financially-oriented requirements (*i.e.*, restrictions on methods and timing of construction, insurance and performance and completion bonds) to protect the safety of the traveling public and transportation workers. While it is perhaps true that a state is not limited to the least restrictive regulation possible, the "necessity" standard implies that any regulation imposed by a state be "needed" and not merely "desired."

To establish competitive neutrality, the State cites those provisions of the Agreement requiring the Developer to sell wholesale capacity on a non-discriminatory basis and to collocate facilities during the initial build-out of the Developer's network. Again, the State's argument

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years and could be extended for as long as fifty (50) years. The State offers no "public safety" justification for this aspect of the Agreement, despite the obviously discriminatory impact of this provision on later entrants to the market.

misses the point. The competitive neutrality demanded by Section 253 is not neutrality in the resale of capacity derived from access to rights-of-way granted on an exclusive basis to a single provider, but rather neutrality in the granting of the access itself. Requiring all providers accessing the rights-of-way to meet the same regulatory and financial requirements is competitively neutral; denying all but one provider access to the rights-of-way clearly is not.

VII. Provisions of the Agreement Confirm that the Agreement is Discriminatory.

The Agreement is replete with provisions that discriminate in favor of the Developer and the State and that place competitors at a distinct, competitive disadvantage. Such provisions include, but are not limited to, the following:

1. The State reserves to itself significant capacity in the Network (as defined in the Agreement). Agreement at III-4 through III-6, III-9.

2. In consideration for the substantial benefits and value provided to the State, the State grants to the Developer certain rights to use certain State-owned, longitudinal inner ducts. Agreement at V-12.

3. As an inducement to the Developer to include certain routes in the Network, the State grants to the Developer the option and right of first negotiation on the development of certain routes. Agreement at V-14.

4. With respect to providers who choose to have the Developer collocate their fiber, the State shall have the right to limit the locations of the collocated nodes and equipment, the State's right of access to the Developer's huts and pedestals shall take priority over the collocated provider's use, and in the event of a State-requested change to the Network that

requires a change to a collocating provider's plans, the State shall have no responsibility for any such changes. Agreement at V-16.

5. The Developer is required to charge uniform and non-discriminatory rates for "similarly situated" collocating providers, and is vested with the authority to modify such rates from time to time and to determine which collocating providers are "similarly situated". The criteria the Developer shall apply in determining which providers are "similarly situated" are not based on the costs incurred for the provider to collocate, but on other considerations and distinctions including, but not limited to, the volume of capacity in the Network utilized, the volume of data transported or the length of time to which a provider commits to the utilization of specified capacity or data volume. Agreement at VII-6.

VIII. Conclusion.

The Agreement violates both the letter and the spirit of Section 253 of the 1996 Act. Moreover, should the Commission rule in favor of the Agreement, such action will impact negatively the development of competition in the telecommunications service industry not only in Minnesota, but nationwide. The State's petition for a Declaratory Ruling that the Agreement is not violative of Section 253 should be denied, and the Commission should exercise its power

of preemption to prevent Minnesota from regulating access to its freeway rights-of-way in a discriminatory manner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Petrina M. E. Chavis, certify that I caused a copy of the foregoing comments of KMC Telecom Inc. and KMC Telecom II, Inc. to be sent by first-class mail this 9th day of March, 1998, to each of the following:

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